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Mediation and Experiential Learning

How a Mediation Clinic Can Inform a Law-based Curriculum

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The perception that students of Law and Legal Studies should learn about a variety of methods of dispute resolution and not just litigation, has prompted the Department of Law and Criminal Justice Studies at Canterbury Christ Church University in Kent UK to establish a mediation clinic as a focus for undergraduate experiential learning. The author of this article will consider the importance of discipline based research and the integration of clinical legal education within the core curriculum, the benefits offered by a combined live and simulated curricula approach in the context of mediation and the importance of providing a practical input during the academic stage of legal education.

Mediation and Experiential Learning By Ben Waters¹

Introduction

There are a variety of ways and settings in which the curriculum can be developed to provide clinical legal education to students at undergraduate level within the UK. The mediation clinic at Canterbury Christ Church University (CCCU) in Kent is the first such clinic to be based within a UK university and has been established with the intention of providing undergraduate Law and Legal Studies students with the opportunity of learning experientially in a somewhat innovative way. This article explores the importance and value of providing an experiential learning element during the academic stage of legal training in England and Wales. The article also provides a view on how discipline based research can help to integrate experiential learning in the core curriculum, and will consider other opportunities which a mediation clinic provides both for the university and the wider community.

The move away from the purely theoretical approach to legal study is by no means new in itself, it is an approach which has been advocated and practised for many decades in the United States for instance.² The growth of experiential learning within the field of legal education³ prompted members of the Law and Legal Studies team at CCCU to consider the possibility of curriculum development to include experiential elements of study. Academic members of the Law & Legal Studies team have become accredited mediators⁴ and as a result of having actively led mediations through work generated by the mediation clinic and through mediations performed for other mediation providers, academic staff have themselves developed useful new skills.

The Integration of Experiential Learning Within the Curriculum

When designing a curriculum which proposes to utilise clinical experience, it is advisable to undertake preliminary research into the most suitable type of clinic given a whole range of criteria. There is of course a variety of clinical programmes ranging from placements/internships, role play simulation to the 'live' clinical experience.⁵ The model which has been chosen for the CCCU project is the 'live' clinical experience supported by simulation.

Why mediation and what is it?

The worthwhile nature of encouraging students of Law and Legal Studies to understand about all kinds of dispute resolution, not just litigation, is reflective of the times we live in and has more relevance now than ever before. Since former Master of the Rolls, Lord Woolf, produced his report on the civil justice system in 1996⁶ and the subsequent enactment of the Access to Justice Act 1999, a holistic approach to dispute resolution is arguably a fundamental part of a UK lawyer's education. This view is supported by Carrie Menkel-Meadow who considers that teaching students about dispute resolution, which broadly includes negotiation, problem-solving,

¹ Solicitor, Mediator, Senior Lecturer in Law and Director of the Mediation Clinic at Canterbury Christ Church University, who owns the copyright to this paper and who can be contacted by email at ben.waters@canterbury.ac.uk.

² See Frank J, 'Why not a Clinical Lawyer School' (1933) 81 University of Pennsylvania Law Review and Law Register 907.

³ See Margaret Martin Barry et. al. *Clinical Education for this Millennium: The Third Wave*, 7 Clinical L. Rev. 1. 18-21 (2000) cited in Wizner S, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 Fordham Law Rev. 1929 2001-2002. who state that virtually all of the more than 100 law schools in the United States have clinical programs (as do some in Canada, Great Britain, Australia, Latin America, Europe, China, Israel, and elsewhere).

⁴ The director of the clinic, Ben Waters and another member of the team Dr Leo Raznovich are now accredited mediators in the UK with CEDR and the ADR Group, having successfully completed training with both these leading UK mediation providers.

⁵ Stark J, *Preliminary Reflections on Establishing a Mediation Clinic* (1996) 2 (2) Clinical Law Review 457

⁶ The Master of the Rolls is the most senior Judge in the civil justice system in England and Wales. See <http://www.opsi.gov.uk/Acts/acts1999/ukpga>. The Civil Procedure Rules Practice Directions came into force on 26th April 1999 and The Access to Justice Act 1999 came into force on 1st April 2000. In his Forward to the Civil Procedure Rules, the Lord Chancellor, Lord Irvine, stated that "we must not forget...that we should see litigation as the last and not the first resort in an attempt to settle a dispute."

and mediation, as well as litigation serves at least four goals: firstly, a focus on the broad spectrum of actual dispute resolution devices provides a more accurate of how the legal system operates. Secondly, dispute resolution study provides a valuable way to incorporate experiential learning in legal education. Thirdly, the concrete lawyering skills that can be taught with a focus on dispute resolution are central to the performance of any lawyering work. Fourthly, using the dispute resolution framework for teaching about what lawyers do, facilitates a particular normative agenda as well⁷

A fresh approach

Failure to educate the next generation of lawyers⁸ about the holistic nature of dispute resolution is at best a serious omission and at worst irresponsible. Students should be aware that there is often more than one way to resolve a dispute, litigation is not always the answer or indeed need not be the process method of choice. With the arrival of the previously mentioned legislation and the introduction of the Civil Procedure Rules, lawyers who practise in England and Wales are required to consider alternatives to litigation where they can.⁹

Informed by teaching and practise, and so as to assist the reader in gaining a basic understanding about mediation, the author has chosen to adopt the following definition of mediation:¹⁰

“Mediation is a voluntary process conducted confidentially whereby the parties to a dispute are empowered to resolve their differences in a structured yet informal environment with the assistance of an impartial facilitator”¹¹

The aims of the university’s mediation clinic are therefore threefold. The first aim is to provide mediation services to the local and wider community, this we have started to do and have so far, in the space of nearly two years, have undertaken nearly twenty mediations. The second aim is to enhance teaching across curricula within the university; this is where the clinical element links in and thirdly to provide a focus for research.

Mediation and the Live clinical Experience

The aims of ‘live’ clinics

According to the Higher Education UK Centre for Legal Education (UKCLE) the broad aims of ‘live’ clinics are¹²:

- to enhance the students' learning experience and understanding of the substantive law, legal process, ethics and the role of law in society
- to produce students that can take the learning experience offered by live client clinics and reflect upon how and why cases were progressed and how this fits into the overall context of their legal studies
- to empower the students to become pro-active in the process of learning
- to provide formative assessment methods which are in themselves a strategic and integral part of the learning experience

A mediation clinic provides an example of how experiential learning can be implemented in an undergraduate curriculum. The research undertaken by those responsible for setting up and

⁷ See Carrie Menkle-Meadow, *To Solve Problems Not to Make Them: Integrating ADR in the Law School Curriculum* (1993) 46 (5) SMU Law Review, 1995, 2003.

⁸ Whilst this refers to solicitors and barristers, there is also merit in educating those students in non-participatory Law/Legal Studies degree programmes as well through the availability of elective modules.

⁹ See *Dunnett v Railtrack* [2002] EWCA (Civ) 303 and *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576.

¹⁰ There are of course many other definitions, for instance Kimberly K. Kovach describes mediation as a process in which a third party neutral, the mediator, assists disputing parties in reaching a mutually agreeable resolution, see Moffitt M, & Bordone R, (Eds), (2005), *The Handbook of Dispute Resolution*, Jossey Bass (San Francisco)

¹¹ See CCCU Mediation Clinic at <http://www.canterbury.ac.uk/business-sciences/crime-policing/mediation/index.asp>

¹² The Higher Education Academy UKCLE at <http://www.ukcle.ac.uk>

establishing the clinic at CCCU, both with regard to the discipline itself and the possible pedagogical opportunities available, has reinforced views about the importance of understanding conflict resolution methods in a variety of different settings from the community forum to those conflicts within the international arena.

The mediation clinic at CCCU therefore places an emphasis on encouraging and enabling students of Legal Studies and Law as a core part of the practical level of their undergraduate study, to understand how conflict can be resolved through a recognised and effective alternative dispute resolution process.¹³ Early research into the project revealed that in other common law jurisdictions, notably, The United States, Canada and Australia, mediation has been taught at university level for many years and in some of the universities in those countries students are given a clinical experience based around the study of dispute resolution and particularly mediation.¹⁴

Reflective practice

Students can also develop an understanding of how a mediation service provider operates and we are involving students in the process as assistant mediators, under the guidance and supervision of experienced members of academic staff, and by being involved in office administration. The assistant positions offered to students are observational in nature enabling them to learn through reflection. Part of the early discipline based research acknowledged that reflective practice is a key component for successful experiential learning and that mediation lends itself perfectly to the reflective practice paradigm, being an active process of exploration and discovery which often leads to very unexpected outcomes.¹⁵ Learning in this context may, as Mezirow has observed [enable the learner to make] a new or revised interpretation of the meaning of an experience, which guides subsequent understanding, appreciation, and action.¹⁶ By experiencing the process of mediation at first hand, students should be able to gain a better understanding and appreciation of a different approach to conflict resolution and undertake comparative studies with other recognised methods. R.A.B. Bush outlines the following benefits that “live” observation has over simulation in the context of studying methods of alternative dispute resolution (ADR)¹⁷

- the observations [balance] the more abstract study of classroom work and reading
- they provided a sense of immediacy and relevance that intensifies students’ interest in ADR
- the opportunity to sit back and watch critically, rather than directly involved in an exercise with classmates allows students a greater chance to be analytical and critical about the operation, and
- students [are] given direct personal contact with the ADR field, contact which helps to overcome the kinds of biases towards ADR that, it has often been noted, exists among legal professionals.

It is not only the students of course who benefit from the experiential nature of this learning approach, the supervisory capabilities of academic staff has been enhanced through their active involvement with the mediation clinic.

¹³ For evidence that mediation is an established and recognised method of dispute resolution see Moore C.W, (2003), (3rd Edition), *The Mediation Process: Practical Strategies for Resolving Conflict*, Jossey-Bass (San Francisco), Kovach K, *Mediation*, in Moffit M, & Bordone R, *op cit* note 41, for an American perspective and *The CEDR Mediator Handbook* (4th Edition) CEDR (London) and Stitt A, J, 2004), *Mediation: A Practical Guide*, Cavendish (London), for a UK perspective.

¹⁴ For examples of universities which have well established mediation clinical programmes see Columbia University New York, Windsor University Ontario, Canada and The University of Queensland in Australia. Indeed in the US the ABA requires a clinical component as part of the JD qualification requirements and as such there are many mediation clinical programmes.

¹⁵ See Boud D, Keogh R & Walker D, *op cit* note 38.

¹⁶ Mezirow J, (1990), *Fostering Critical Reflection in Adulthood, A Guide to Transformative and Emancipatory Learning*, Jossey-Bass (San Francisco)

¹⁷ Bush R.A.B. *Using Process Observation to Teach Alternative Dispute Resolution: Alternatives to Simulation* (1997) 37 Journal of Legal Education 46.

The work of David Kolb, who introduced his now well known four stage learning cycle,¹⁸ is helpful in understanding the value of experiential learning¹⁹ in the context of the study of mediation. Kolb²⁰ emphasises the affective side of learning because in his view, which is a view shared by other educational psychologists,²¹ people learn from experience through a direct encounter with life that involves total immersion with all its attendant sensations and feelings. The affective dimension to learning includes emotions and also a deeper, non-rational understanding of the situation.²² This further embeds the notion that the mediation process, which often involves parties participating in a process of emotional release, fits the reflective practice model of learning quite appropriately.

Clinical legal education in the UK is still a relatively unadvanced concept. There are notable exceptions; the clinics at Northumbria, Warwick and Kent Universities are nationally if not internationally renowned.²³ It has been mentioned that there are a number of different types of clinical experience. For James Stark, the emphasis on reflection and critique should be a common factor for all types of clinical experience while the teaching control and the learning environment may differ.²⁴ The mediation clinic at CCCU aims to design and develop new and innovative curricula using the work of the clinic as a focus. As already mentioned, observation experience of “live” mediations is being offered to the students.

Transferable skills

Through involvement with the clinic, both by observing “live” mediations and by participating in simulated role play exercises, students are not only able to appreciate and understand the ethical dimensions of mediation, but will improve their personal and interpersonal skills, autonomy, independence of thought and decision making skills. They are able to do this by reflecting on their experience. Indeed reflection arguably works best with engagement and proactivity on the part of the learner,²⁵ a concept which is supported by the use of the mediation process as a focus for students’ knowledge development and the development of their transferable skills. The skills which students gain from their “live clinical” experience provide much scope for reflection and will ultimately enhance their employability. This is currently a key issue for graduates from higher education in the UK. The importance of an experiential base for a degree is therefore increasingly acknowledged as important in building employment-related skills²⁶.

CCCU has a rich tradition in providing “vocational” education for those intending to enter public sector employment, from social work and healthcare provision to policing. The work undertaken by the mediation clinic and the exposure which students will have to it, will continue this tradition. With the development of a qualifying law degree which has been offered since September 2008, the clinic forms a cornerstone of one of the university’s driving principles, that being the concept of theory meeting practice and the reinforcement of theory through practice. Whilst the mediation clinic is currently situated within the department for Law & Criminal Justice Studies, the nature of mediation and conflict resolution as a curriculum taught subject area, lends the clinic to cross-faculty participation; involvement with other departments should therefore be encouraged.

¹⁸ See Kolb, D in Boud D, et al *op cit* note 9.

¹⁹ In the 1970s Kolb introduced the idea that learning takes place as part of a four stage process: the learner has a concrete experience, secondly the learner engages in observational reflection of that experience, thirdly the learner will go through a process of forming abstract conceptions and generalisations about the experience and lastly, the learner will test the implications of the learning experience in new situations.

²⁰ Kolb, D, (1984), *Experiential Learning*, Prentice Hall, (New Jersey)

²¹ Kolb drew from and developed the ideas put forward by such thinkers as John Dewey, Jean Piaget and Kurt Lewin.

²² Marsick, V, Sauquet, A & Yorks, L in Deutsch, M, Coleman, P & Marcus, E, (2006), *The Handbook of Conflict Resolution, Theory & Practice*, Jossey-Bass (San Francisco)

²³ See Northumbria University Law School at <http://northumbria.ac.uk/>, Warwick University Law School at <http://www2.warwick.ac.uk/fac/soc/law/ug/> and Kent University Law School at <http://www.kent.ac.uk/law/clinic/>

²⁴ See Stark J, *op cit* note 6.

²⁵ Brown H, Fry H, & Marshall S, in Fry H, Ketteridge S, & Marshall S, (2006), *A Handbook For Teaching & Learning in Higher Education* (2nd Edition), Routledge Falmer (Abingdon).

²⁶ Beattie L, *Supporting Learning From Experience* in Fry H, et al see *supra* note 22.

The encouragement and promotion of research

To enhance the research profile of academic departments, clinics are seen as increasingly important at the academic stage of legal academic study within the UK. The mediation clinic is the first of its kind in a UK law school and the study of alternative dispute resolution will produce a research-based curriculum. It is providing academic staff with data which will form the foundation of research projects, to be entered into in partnership with other departments within the university, or externally with private sector, public sector and voluntary sector providers²⁷. It is also hoped that the clinic will provide a knowledge sharing forum which amongst other things will assist in spreading the message about the appreciable benefits of alternative dispute resolution and particularly mediation.

Conclusion

The establishment of the mediation clinic at CCCU clearly demonstrates the benefits of discipline based and research informed teaching. The initial research into the type of the model through visiting other institutions and by talking to experienced academics involved in clinical practice has been invaluable to the success of the initial phases of the project. The pedagogical opportunities for curriculum design and development through studying law based undergraduate subjects not only at the micro level, but also at the macro/practical level through experiential learning, helps to make an important link between theory and practice using conflict resolution and particularly mediation and the work of the clinic as the focus. In addition the combination of the live clinical experience with simulation arguably helps to produce a rather less prosaic undergraduate Law curriculum.

²⁷ A small team of academic members of staff within the department of Law & Criminal Justice Studies at CCCU, including the author of this paper, is currently involved in research into the benefits of victim/offender mediation in prisons in Kent UK, which will provide research opportunities.

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